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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

MEMORANDUM OF APPELLEE.

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March 15, 1934.

SUPREME COURT OF THE UNITED STATES

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No. 609

THE DAYTON POWER & LIGHT COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO.

MEMORANDUM OF APPELLEE.

During the oral argument of this cause, the Court requested that counsel file a brief memorandum setting forth certain information, with appropriate references to the Record, requested by the Court during the argument and which counsel was unable at the time to supply.

Counsel for appellee are accordingly filing this memorandum setting out the information requested by the Court as we understand it.

Summary Statement.

On June 17, 1929, the appellant filed with The Public Utilities Commission of Ohio a schedule of rates for the supply of gas in the several small Ohio municipalities involved in this case. This schedule which the company presumably considered to be entirely adequate to meet all its operating expenses and to provide a full and fair return

on its property averaged 67.6¢ per M. C. F., according to the company's own calculations (R. 581).

However, in attempting to sustain the burden of proving the reasonableness of its proposed rate, the company sought to show among other items of expense and value the following:

1. An 8% return on its claimed rate base of $1,250,221 (reduced by the Commission to a 6½% return). (Discussed in Appellee's Brief, p. 129 *et seq.*)

2. A return on $139,545 which consisted of the estimated cost of cutting and restoring paving over pipe lines which cost the Record discloses had never been incurred and was therefore eliminated by the Commission (R. 354, 361). (Discussed in Appellee's Brief, p. 34 *et seq.*)

3. A return on a separate going concern value of $125,000, a flat 10% of the claimed rate base. (This item was eliminated by the Commission.) (Discussed in Appellee's Brief, p. 38 *et seq.*)

4. A return on $39,600 consisting of the estimated costs of financing not in fact incurred and therefore eliminated by the Commission. (Discussed in Appellee's Brief, p. 29 *et seq.*)

5. A return on $130,640 consisting of overheads estimated at 17% of the depreciable physical property. (This item was found by the Commission to be 14% or $99,045.) (Discussed in Appellee's Brief, p. 47 *et seq.*)

6. A return on $83,200 consisting of an estimated allowance for working capital. (This was reduced by the Commission to $61,880.) (Discussed in Appellee's Brief, p. 50 *et seq.*)

7. A return on $24,774 consisting of the estimated organization or preconstruction costs not in fact in-

curred. (This item was entirely eliminated by the Commission.) (Discussed Appellee's Brief, p. 24 *et seq.*)

8. An annual depreciation allowance of $43,981. (This was reduced by the Commission to $13,721.) (Discussed in Appellee's Brief, p. 55 *et seq.*)

9. General administrative expense of $38,395. (This was reduced by the Commission to $32,432.) (Discussed in Appellee's Brief, p. 52.)

10. Gas purchase expense amounting to $536,611 at the rate of 45¢ per M. C. F. (This item was reduced by the Commission to $465,064 or 39¢ per M. C. F.) (Discussed in Appellee's Brief, pp. 57-109.)

All other items of valuation and expense submitted by the Company were accepted by the Commission without question but it did determine that the foregoing items were either excessive or should be wholly disallowed and that consequently the rate of 67.6¢ proposed by the Company was unreasonable and should be stricken from the files. The pertinent portion of the Commission's order thereon being as follows:

> "* * * And the Commission, coming now to consider the matters herein at issue, and having due regard for all of the testimony and exhibits offered and introduced in evidence at the hearing held herein, and having, this day, made and filed in writing, its findings of fact in this proceeding, and hereby readopting the finding and order made and entered herein November 21, 1930, the going into effect of which finding and order was suspended by the entry of January 9, 1931, hereby further finds:
>
> That the respondent has not sustained the burden imposed by the Statute and proven to be just and reasonable, the proposed increased rates set forth in the proposed schedules aforesaid.
>
> It is, therefore, ordered that the aforesaid proposed new schedule of The Dayton Power and Light Com-

pany be, and hereby the same, and each of them, are stricken from the files of this Commission and the said The Dayton Power and Light Company hereby notified, directed and required to cease and desist from collecting, imposing or charging, or attempting to collect, impose or charge the proposed rates set forth therein * * *."

This order was affirmed by the Supreme Court of Ohio, The Dayton Power and Light Company *v.* The Public Utilities Commission of Ohio, 127 Ohio State 137 (R. 82). Thereupon the Company, instead of filing a new schedule of rates lower than the promulgated schedule of 67.6¢ appealed to this Court. The failure of the Company to pursue the further remedy opened to it of seeking a new rate at the hands of the Commission, manifestly prohibits it from claiming confiscation before this Court as on any one of innumerable grounds the Commission was justified in cancelling the proposed rate of 67.6¢. For as a matter of fact the 61.9¢ rate collected by the Company under its former schedule of rates on the basis of all the evidence is not confiscatory.

The following table shows each of the items disallowed by the Commission in total dollars and a computation of the effect of such reductions in cents per M. C. F. of gas sold by the appellant in the territory here involved:

Valuation:	Claimed by Co.	Allowed by Comm.	Effect in cents per M. c. f. of gas sold
Organization Costs	$24,774	$00.00	.15
Cost of Financing	39,600	00.00	.23
Paving over Mains	139,545	00.00	.83
Going Concern Value	125,000	00.00	.74
General Overheads	130,640	99,045	.19
Working Capital	83,200	61,880	.13
			2.27*

* Calculated on a 6½% Return.

Return	8%	6½%	1.19*
Expenses:			
Annual Allowance for Depreciation	$43,981	$13,721	2.76
Administrative Expense	38,395	32,432	.54
Gas Purchased	536,611	465,064	6.51
			9.81
Grand Total of Differences			13.27

* Calculated on rate base found by Commission.

The Company attempted to justify the gate price for gas purchased from the Ohio Fuel Gas Co. by asserting an 8% return on a rate base which included the items listed below and which were properly disallowed by the Commission and by also asserting an exhorbitant claim for amortization which was substantially allowed by the Commission:

	Claimed by Co.	Allowed by Commission	Difference in M. C. F.
Gas Purchased:			
Operated Leaseholds	21,358,057	7,284,900	1.70
Gas wells	19,185,802	10,014,126	1.09
Return on 74,538,280	8%	6½%	2.09
Amortization	5,449,221	4,158,954	2.43
Disallowed by Commission			7.31

The Ohio Statute.

The Appellant suggests that the Ohio Statute (Section 614-20 of General Code 110 Ohio Laws 366) required the Commission to fix a new rate in the event it struck from the files the promulgated schedule of increased rates sought to be established by the Appellant. There are two patent

reasons why this newly alleged error cannot be raised in this Court:

1. The Company never requested the Commission to fix such a new rate, never assigned the Commission's failure so to do as an error in its appeal to the Supreme Court of Ohio, and the Supreme Court of Ohio never passed upon the question (Petition in Error to Supreme Court of Ohio, R. 38; Opinion and judgment of the Supreme Court of Ohio, R. 86), and this contention is not contained in the Assignment of Errors to this Court. (R. 4, Supreme Court of the United States, Assignment of Errors.)

2. Even had error been assigned and had the Supreme Court of Ohio decided that the Commission was not required to fix a new rate under the terms of the Ohio Statutes but that the Company must suggest a further schedule of rates, manifestly no federal question would be raised.

Furthermore, it is obvious that the Supreme Court of Ohio did not consider that the Commission had passed upon the reasonableness of the rates in effect at the time the new schedule was filed, for had it done so it would have reversed the Commission on the ground that such rates were unreasonable and unlawful under its decision in The Columbus Gas and Fuel Company case. For it should be remembered that the old rate in effect in the towns involved in this proceeding was 61.9¢ per M. C. F. (R. 581).

The Ohio Fuel Gas Co. Balance Sheets.

In accordance with the request of Mr. Justice Brandeis, may we suggest that the Balance Sheet of the Ohio Fuel Gas Company for the year ending December 31, 1929, is

found at pages 2901 and 2902 of Volume 4 of the Record in the case of Columbus Gas and Fuel Company *vs.* The Public Utilities Commission of Ohio, *et al.*, No. 608, in this Court, and that this Balance Sheet discloses as of December 31, 1929, surplus of $5,288,031.10 and reserves of $20,861,382.89 and that the Balance Sheet for this same Company for the year ending December 31, 1930, is found at pages 3033 and 3034 of Volume 4 of the Record in the Columbus Gas and Fuel Company case, *supra*, and that for the period ending December 31, 1930, surplus totalled $3,704,366.28 and reserves $21,056,627.18.

We have searched the Record in an attempt to furnish a citation to the Balance Sheet of The Dayton Power and Light Company, the Appellant herein, but we are unable to find this Balance Sheet any place in this Record.

Operated and Unoperated Leaseholds.

During the argument of this cause the question arose as to reserves for gas contained in the leasehold acreage valued by the Appellee as being actually used and useful (operated or Class 1 leaseholds). The statement was made by counsel for Appellee that the testimony of at least two of the witnesses for the Company had indicated that the gas reserves of the operated or Class 1 leaseholds was adequate for many years to come. To support that statement we should like to cite the Court to the testimony of Appellant Company Witness Dally (Columbus Gas and Fuel Company case, R. 1098), and Company Witness Wittmer (Columbus Gas and Fuel Company case, R. 1164), wherein these witnesses stated that there remained at the time of this valuation gas unproduced from operated or Class 1 leaseholds to the extent of 4,000,000 cu. ft. per acre. It was also stated by Witness Dally (R. 1136) that approximately 90% of the gas underlying the operated lease-

holds had not yet been taken from the ground. It is not disputed that the amount of acreage in the operated leaseholds consists of 291,396 acres (Columbus Gas and Fuel Company, R. 2911). Accordingly the gas reserves of this operated leasehold acreage in cu. ft. may be computed by multiplying 4,000,000 cu. ft. per acre by 291,386 for a total of 1,165,584,000 M. C. F. The Record further discloses that the annual sales of gas of the Ohio Fuel Gas Company at city gates totaled 53,943,794 M. C. F. (R. 2907, Columbus Gas and Fuel Company case). Divide 1;165,584,000 by 53,579,575, a result of 21.5 is obtained.

In other words upon the basis of the testimony of at least two of the Company's witnesses the operated leaseholds allowed by the Commission as used and useful property in the furnishing of gas contained a supply sufficient at the present rate of consumption to last 21.5 years from December 31, 1929, and this is all the more significant when it is considered that more than 50% of the gas sold by the Ohio Fuel Gas Company is purchased from the United Fuel Gas Company and independent producers. (R. 2905, 2906.) Therefore if the Ohio Fuel Gas Company continues to purchase gas from other producers in the same quantities the life of the operated leaseholds (Class 1) would be extended to 43 years. In the face of such testimony there can be little merit to the contention of the appellant that additional gas reserves other than that contained in operated leasehold acreage were necessary. Our discussion of this subject is found in Appellee's Brief, pages 75-90 inclusive.

Value of Leaseholds.

Some question was raised by the Court during the argument of this cause as to the precise method used by the Commission in evaluing the leaseholds of the Ohio Fuel Gas

Company. This matter is fully discussed by the Commission in its opinion in the Columbus Gas case (R. 149 *et seq.*) and this opinion became a part of the Record in this case by stipulation of the parties (R. 138).

We should like to further refer the Court to the testimony of Blundon (City of Columbus witness in Columbus Gas and Fuel Company case) wherein he stated that the average prices paid for Class 1 acreage by the Company in the years 1927, 1928 and 1929 for all acreage acquired by the company was $2.05 per acre. (R. Columbus Gas and Fuel Company case, page 1419; see also pages 24 and 25 of City Exhibit 115, R. Columbus Gas and Fuel Company case, pages 3187, 3188 and 3189.) Our discussion of this subject is found in Appellee's Brief at page 91-109 inclusive.

Conclusion.

Counsel for Appellee have not interpreted the Court's request for the filing of this memorandum as a request for the filing of a supplemental brief and we have therefore confined ourselves to answering those questions requested by the Court.

Respectfully submitted,

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March 15, 1934.